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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PAUL VREEBURG, et al.,

Plaintiffs and Appellants,

v.

ROGER W. REID, et al.,

Defendants and Appellants.

H041649

(Santa Cruz County

Super. Ct. No. CV-172686)

Plaintiffs Paul and Denise Vreeburg successfully moved under Code of Civil Procedure section 664.6 to enforce the oral settlement of a property dispute with their neighbors, defendants Roger and Shannon Reid. From the resulting judgment defendants appeal, asserting two grounds for reversal: (1) There was no meeting of the minds as to either the goals or the material terms of the settlement; and (2) The judgment included language that was inconsistent with settlement terms. We conclude that there was in fact a meeting of the minds, but that the judgment did not reflect the express language of the parties' agreement. We therefore must reverse the judgment.

*Background*

Plaintiffs initiated this litigation in November 2011 with their verified complaint for quiet title, trespass, and declaratory relief. Plaintiffs alleged that defendants, who owned the adjacent Scotts Valley property to the south, had no rights or interests in plaintiffs' property; and even if they did, those interests were limited to a right of way only for ingress and egress within the paved boundaries of an existing road leading to

defendants' property, not a 40-foot area as referenced in defendants' deed. Plaintiffs further alleged that defendants had trespassed on plaintiffs' property by parking vehicles there, as well as installing and using a tent trailer, concrete pads, a propane tank, gate posts, fence posts, and fencing material.

Defendants answered plaintiffs' complaint and later filed a cross-complaint to quiet title to their existing right of way over the road that extended from the boundary of the parties' property to Sand Hill Road. Defendants also sought declaratory relief to confirm their express easement, an implied easement, or an easement by necessity in the road that crossed plaintiffs' property. Finally, they requested a judicial declaration that they had title to the land on which the propane tank was located—or alternatively, a prescriptive easement over that portion of plaintiffs' property—as well as a prescriptive easement over plaintiffs' property for the use of the concrete pads.

Plaintiffs answered defendants' cross-complaint and then filed their own cross-complaint, asserting breach of contract based on an alleged promise by defendants in 2004 to remove the tent trailer and propane tank that were encroaching on plaintiffs' property. Defendants answered that pleading, denying the allegations and asserting the bar of the statute of limitations among other affirmative defenses.

After extensive negotiations, the parties arrived at a settlement. The terms of their agreement were recited by plaintiffs' attorney, Michael Tunink, at a hearing on October 15, 2013. The settlement agreement called for defendants to execute a deed quitclaiming to plaintiffs all interest they might have in plaintiffs' property (defined by plaintiffs' 1988 deed). Immediately thereafter, plaintiffs were to record a deed granting defendants an easement “for ingress and egress over the existing paved driveway depicted on the baseline survey to the extent that driveway is actually on the Vreeburg property.” This easement was to include a provision for defendants' placement and maintenance of underground water lines, which could be no more than two feet west of the designated driveway. By January 15, 2014, defendants were to remove all seven of the fence posts

they had erected and the one gate post that was on plaintiffs' property. Defendants also were to remove the tent trailer from the concrete pad by November 15, 2013 and the concrete pad itself by March 1, 2014. They were given until June 1, 2014 to move the propane tank to a location no less than one foot south of plaintiffs' southern boundary. In addition, plaintiffs were to receive \$15,000 from defendants' insurer.

Tunink acknowledged that two competing surveys had been prepared regarding the boundary of the two properties: the BaseLine survey, prepared by Mark T. Doolittle for plaintiffs in 2004; and the Jensen survey, prepared by Paul Jensen for defendants after plaintiffs filed suit. Under the agreement the area between the southern boundary according to the [B]ase[L]ine survey and the southern boundary according to the Jensen survey was deemed a "no-build" zone. As Tunink described this provision, "In that zone from now forward nothing shall be erected, no structures, nothing shall be built, nothing shall be stored. The only thing that shall be allowed to reside in that area is the Reids' waterline, underground waterline to the extent that it is there already. [¶] The no-build zone shall be an exhibit to the settlement agreement that I'm going to refer to later, and the no-build zone shall be depicted and crosshatched or other kinds of markings on a copy of the Jensen survey so that the parties clearly identify what the no-build zone is."

As to attorney fees, the agreement stated, "Each side is to bear [its] own attorney's fees and costs in connection with this action except that in the event one party needs to enforce the settlement agreement against the other party, the prevailing party shall be entitled to attorney's fees and costs."

Most critical to the outcome of this proceeding is the following provision, which we quote from the reporter's transcript of the October 15, 2013 hearing: "The settlement shall be binding on successors and transferees of the Vreeburgs and the owners of the Vreeburg property and the Reid property. The settlement agreement shall include a release of all claims. The settlement agreement shall call for the dismissal with prejudice of the Vreeburgs' Complaint in this action and all Cross-Complaints. The settlement

agreement shall call for the parties to waive their rights under Civil Code Section 1542 as it relates to unknown or unanticipated claims that are related to the subject matter of this action.”<sup>1</sup>

Finally, the agreement stated that it had been reached as a result of a judicially supervised settlement conference, which would be enforceable under Code of Civil Procedure Section 664.6. If the parties were to “bog down” in committing the terms of the agreement to a writing, the court would be authorized “to impose the terms of the settlement agreement on the parties.”

The parties and their counsel all expressly agreed to these terms in open court. When it came time to set forth the terms in writing, however, the parties did indeed “bog down.” Plaintiffs’ attorney included a term recognizing the dispute between the parties regarding the boundary between their properties. In his proposed paragraph 2.G, he wrote, “Said contentions [pertaining to the disparity between the competing surveys] remain in dispute among the Vreeburgs [*sic*] and the Reids *are not released or waived* pursuant to Paragraphs 3 and 4 below.” (Italics added.) The ensuing paragraphs included a mutual release and waiver of claims “*except for the unresolved dispute related to the Vreeburg-Reid Common Boundary Line set forth in Paragraph 2.G above . . .*”

Defendants’ attorney, Thomas Dwyer, called attention to this language, noting that the parties had “agreed to disagree as to which survey is correct, Base[L]ine’s or Jensen’s.” Dwyer suggested that Tunink remove the exception to the release and waiver in paragraph 2.G. In subsequent correspondence, Dwyer stated, “I cannot in good conscience recommend that my clients sign a settlement agreement that leaves them open to future litigation filed by the Vreeburgs regarding their shared boundary. My clients

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<sup>1</sup> Civil Code section 1542 states: “A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”

believed the settlement meant that as long as the Vreeburgs' [sic] and the Reids' [sic] owned their respective properties, they would agree to live side by side with the 'no-build zone.' Each agreed to live with the unresolved boundary issue in order to settle their entire dispute. The settlement agreement includes a 'release of all claims' and a dismissal with prejudice of all pleadings. My clients need to know that this is the end of any litigation with the Vreeburgs, and want language in the settlement agreement that reflects that. [¶] If the Vreeburgs believe they have the right to refile on the boundary issue or they intend to do so, my clients would like that issue resolved in this litigation. . . I believe Judge Marigonda will agree that it is not in the interests of judicial economy (nor is it cost-effective) to sign a settlement that will spawn another lawsuit. If there are issues that remain to be resolved between the parties, let's do it in this action."

Tunink, however, insisted that the release was not to apply to the boundary dispute, and he represented that plaintiffs would not consent to what he perceived as Dwyer's "request to restart this case . . . to litigate the unresolved boundary dispute." Tunink warned Dwyer that defendants' opposition to the proposed written agreement "may come at a price"—that is, the imposition on them of plaintiffs' attorney fees for a successful motion to enforce the settlement.

In one of a series of status reports to the court, Dwyer explained the impasse as follows: "Defendants' understanding at the mediation at which the settlement was placed on the record was that the settlement agreement was to include a release of all claims and that as to the common boundary line, since the parties had agreed to disagree as to where the common boundary was, the agreement would include a no build zone in that area. Defendants are unwilling to sign a settlement agreement which releases all claims except for the issue involving the common boundary line for fear that such an agreement will not have settled anything, but instead will generate another lawsuit by the Plaintiffs."

On February 27 and 28, 2014, and again on May 27, 2014, the court and counsel discussed the release issue regarding the no-build zone. At the second hearing, the court

expressed its “strong recollection” that the boundary dispute “was not going to be part of the settlement of all claims.” Dwyer explained his position that the parties had “agreed to disagree as to the location of the common boundary line. They therefore agreed to a no-build zone . . . and that there would be [a] release of all claims.” Tunink reiterated that the parties had not resolved which survey depicted the correct boundary line. He urged the court to retain the portion of his draft that retained defendants’ potential liability for “claims and causes of action related to the common boundary line.” The court found these divergent views to be a “distinction without a difference. I think that as long as the intention is the same. . . the key language that needs to be in, however it’s worded, is that the settlement of all claims does not include the boundary. . . Whatever words you end up using in the settlement of all claims, the intention still remains that this boundary dispute and this no man’s land is not resolved by the settlement of all claims.”

The parties filed competing motions to enforce the settlement on May 2, 2014. At a subsequent hearing on May 27, 2014, the court again expressed its recollection that “any release of claims is not going to extend to the issue of this disputed, this no build zone.” Dwyer again emphasized that the purpose of the no-build zone was to settle the dispute over the exact location of the common boundary and thereby eliminate the expense and uncertainty of further litigation between the parties. Tunink agreed with Dwyer only as far as creating the no-build zone “as a method to settle the case short of actually resolving the boundary dispute that was not resolved . . . . If it’s not resolved, then it would be perpetually unresolved in the future. And . . . if the Court were to grant the motion, as the Reids seek to have it interpreted, then . . . both these properties would forever have unmarketable, uninsurable title as a result of the resolved boundary dispute.” In response, Dwyer pointed out that any future buyer was free to procure his or her own survey. The court, however, observed that “it is very hard to have a piece of property with a boundary that’s unresolved.” The court then granted plaintiffs’ motion based on its recollection that “anything that we resolved is not going to include that particular

area.” Dwyer then raised the alternative proposal, to withhold judgment and resolve the boundary dispute by trial to avoid prejudicing defendants, but the court rejected the suggestion.

Over the next six months the parties continued to disagree about the language to be used in the final judgment, resulting in yet another hearing on November 20, 2014. The judgment, filed the same day, reflected the unchallenged substance of the October 15, 2013 oral settlement, while including the following disputed paragraphs that are before us in this appeal. “6. Unresolved Disputes Regarding the Boundary Lines of the Vreeburg Property, the Reid Property, and the Vreeburg-Reid Common Boundary Line. The Vreeburgs contend the correct location of all boundary lines of the Vreeburg Property and also the northern, western and eastern boundary lines of Reid Property (including the Vreeburg-Reid Common Boundary Line) are as set forth in the BaseLine Survey. The Reids contend the correct location of the boundary lines of the Vreeburg Property and the Reid Property (including the Vreeburg-Reid Common Boundary Line) are depicted in bold lines in the Jensen Survey. Said contentions remain in dispute among [sic] the Vreeburgs and the Reids because the settlement of this matter did not include any settlement of any boundary dispute or any settlement related to title to the No-Build Zone. . . . [¶] 7. Mutual Release and Waiver. Except for the duties and obligations of the Parties that are contained in this Judgment, and except for the unresolved disputes set forth in Paragraph 6 above, effective as of the Effective Date, the Vreeburgs and the Reids, individually and on behalf of their respective heirs, assignees, transferees, successors, agents and representatives, hereby release the other and their respective heirs, assignees, transferees, successors, agents and representatives, from any and all claims, rights, liabilities, and causes of action, whether known or unknown, whether anticipated or unanticipated, arising out of or in any way connected with the subject matter of this action.” Defendants then filed this timely appeal.

### *Discussion*

Code of Civil Procedure section 664.6, the statute governing the settlement at issue, provides: “If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court *or orally before the court*, for settlement of the case, or part thereof, the court, upon motion, may enter judgment *pursuant to the terms of the settlement*. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.” (Italics added.) The requirement of the parties’ direct participation in the oral or written agreement “tends to ensure that the settlement is the result of their mature reflection and deliberate assent. This protects the parties against hasty and improvident settlement agreements by impressing upon them the seriousness and finality of the decision to settle, and minimizes the possibility of conflicting interpretations of the settlement.” (*Levy v. Superior Court* (1995) 10 Cal. 4th 578, 585; see *Johnson v. Department of Corrections* (1995) 38 Cal. App. 4th 1700, 1709 [oral settlement improper where plaintiff did not personally acknowledge settlement]; *Murphy v. Padilla* (1996) 42 Cal.App.4th 707, 716 [same].)

The court in this case did retain jurisdiction to enforce the settlement, as stipulated by the parties. In accepting the oral settlement, the court followed the guidance of our Supreme Court in *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911, by considering “whether (1) the material terms of the settlement were explicitly defined, (2) the supervising judicial officer questioned the parties regarding their understanding of those terms, and (3) the parties expressly acknowledged their understanding of and agreement to be bound by those terms. In making the foregoing determination, the trial court may consider declarations of the parties and their counsel, any transcript of the stipulation orally presented and recorded by a certified reporter, and any additional oral testimony. [Citations.]” We review the judgment and order according to the substantial evidence standard. (*Ibid.*)

Defendants first argue on appeal that there was no meeting of the minds as to the goals and material terms of the settlement—in particular, the term relating to the inclusiveness of the release and waiver of claims. They alternatively contend that the language of the judgment providing only a *partial* release of claims is inconsistent with the oral settlement of October 15, 2013. Plaintiffs respond that the parties did reach an agreement, after which defendants had “belated misgivings” about the unresolved boundary issue. Because they had stipulated that the court could impose the terms of the settlement on the parties if they “bogged down” in the process of approving the language in its written form, the trial court “properly stepped in and resolved the conflict,” and defendants “should not be able to overturn the trial court’s ruling.”

“A settlement is enforceable under section 664.6 only if the parties agreed to all material settlement terms.” (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1182 (*Hines*).) Here it is clear that the parties did reach agreement at the October 15, 2013 hearing. Upon questioning by the court, Paul Vreeburg, representing the interests of his wife, Denise, stated that he understood those terms, that he had had enough time to review them with Tunink and had no questions about them, and that he agreed to them. Shannon Reid, representing her husband, Roger, also confirmed that she understood and agreed to the settlement terms. There is no evidence that either side was confused, and in our view, no ambiguity in the language of the settlement as recited by plaintiffs’ attorney at the hearing.

But that clarity does not inhere to plaintiffs’ advantage. We agree with plaintiffs that the record provides substantial evidence that in settling the case “the parties left the Common Boundary dispute unresolved.”<sup>2</sup> There is no dispute on this point. But leaving

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<sup>2</sup> Plaintiffs make much of the fact that the pleadings alleged no cause of action regarding the boundary dispute. However, it is both obvious and unremarkable that the boundary dispute did arise in the course of this litigation. The Jensen survey commissioned by defendants was not conducted until several weeks after plaintiffs filed their initial complaint. While the discrepancy between the surveys was not resolved, it

the boundary dispute unresolved does not mean that they left the door open to further litigation between them on this issue. The oral agreement on October 15, 2013 provided that these parties would end *all* of the litigation arising from and related to this lawsuit, even over those issues they had not resolved. Instead, as defendants' attorney put it, they "agreed to disagree" in order to end the litigation and, in Shannon Reid's words, "bring finality to this dispute."

Clearly defendants did not, as plaintiffs represent, object to the *location* of the common boundary being unresolved; their objection was only to a written provision that allowed further *litigation* between the parties over the boundary, because that provision did not reflect the actual settlement reached in court. Likewise, defendants' suggestion that the court resolve the boundary dispute at a trial rather than leaving it for future litigation was not an "inappropriate game," as plaintiffs continue to allege; defendants' suggestion was made in the alternative, to avoid having to live with the threat of future litigation should the court reject their position regarding the release of all claims.<sup>3</sup> Nor can defendants' position be fairly characterized as "belated misgivings" about the settlement. As indicated in the correspondence between counsel and in the declaration of Shannon Reid,<sup>4</sup> defendants wanted only enforcement of the *actual* agreement orally reached at the hearing rather than the written version composed by plaintiffs' attorney.

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unquestionably occasioned the parties' agreement to respect a no-build zone, which became a significant component of their settlement.

<sup>3</sup> Shannon Reid expressed this concern in her declaration: "If the Vreeburgs wish to adjudicate the exact location of our common boundary, I would ask the Court that that issue be determined in this action, prior to entry of judgment on the settlement or dismissal. Otherwise my husband and I will be living with the perpetual uncertainty as to whether or when the Vreeburgs will sue us again, and when they do, we will incur additional litigation costs, including filing fees and discovery costs."

<sup>4</sup> In her declaration Shannon Reid explained, "I agreed to the terms of this settlement in order to resolve *all* issues between the Vreeb[u]rgs and us, regarding both the right-of-way and our common boundary. Rather than determine the exact location of the boundary, we agreed to live with the "No-Build Zone." By releasing *all* claims and

Similarly unconvincing is plaintiffs' charge that defendants are attempting to have a perpetual no-build zone with no opportunity for plaintiffs to achieve certainty regarding where the actual boundaries are. Plaintiffs complain that the oral settlement as interpreted by defendants would preclude litigation in perpetuity with other parties. It does not; it binds the parties to *this* lawsuit and the "successors and transferees" of plaintiffs. Had plaintiffs wished the agreement to leave open the prospect of future litigation over the boundary against *defendants*, that is the agreement they should have attempted to put on the record. Instead, the parties expressly stated that they understood and agreed that the settlement would include "a release of *all* claims" between them, and that they "waive[d] their rights under Civil Code section 1542 as it relates to unknown or unanticipated claims that are related to the subject matter of this action." The settlement did not restrict plaintiffs from resolving the boundary issue either by negotiation with defendants or by future litigation, if necessary, with defendants' successors.

Plaintiffs further "implore the Court to reject the Reids' oxymoronic contention that the parties' boundary dispute is both unresolved and yet forever released." In their view, "[a] boundary dispute cannot be both unresolved on one hand and released on the other hand." This argument is without merit. We see nothing inherently contradictory in a statement that a factual issue remains while the litigation over that issue is deemed to end.

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dismissing the pleadings *with prejudice*, I understood there would be no further litigation between the Vreeb[u]rgs and my husband and [me]—as long as we own our respective properties. . . . By agreeing to a settlement and release, by agreeing to remove the concrete pad, the fencing, and other items at our own expense, we hoped to bring finality to this dispute. We also agreed to record a deed quitclaiming any interest in the Vreeburgs' property. We need to know the Vreeburgs cannot bring another action once this action is dismissed. The Vreeburgs threatened another neighbor with litigation. I truly believe that if the language proposed by Mr. Tunink is included in the settlement, it is only a matter of time before we are back before this Court as defendants in a new lawsuit."

“If difficulties or unresolvable conflicts arise in drafting the written agreement, the oral settlement remains binding and enforceable under section 664.6. Having orally agreed to settlement terms before the court, parties may not escape their obligations by refusing to sign a written agreement that conforms to the oral terms.” (*Elyaoudayan v. Hoffman* (2003) 104 Cal.App.4th 1421, 1431.) But by the same token, having orally agreed to settlement terms, a party may not insert language in the written agreement that does not conform to the oral terms. “The oral settlement, like any agreement, ‘imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.’ [Citation.]” (*Ibid.*)

Unquestionably, when the judge who presided over the settlement also hears the section 664.6 motion to enforce the settlement, the judge may consider his or her own recollection of the settlement proceedings. (*Kohn v. Jaymar-Ruby* (1994) 23 Cal.App.4th 1530, 1533.) In granting plaintiffs’ motion, the trial judge in this case relied on his “clear” recollection of the October 2013 hearing that the release of claims was “not going to extend to the issue of this disputed, this no build zone.”<sup>5</sup> The no-build zone was not an “issue,” however, but a solution to the discrepancy between the survey results. Although the judge correctly observed that the *location* of the boundary was unresolved, that was the very purpose of the no-build zone. By agreeing not to erect or store anything in that area (other than defendants’ existing underground water line), the parties agreed to *forgo* litigation on this point while resolving the issues raised in the complaint and cross-

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<sup>5</sup> The court explained its “recollection” at the May 27, 2014 hearing: “[M]y recollection in determining the disputed facts that any release of claims is not going to extend to the issue of this disputed, this no build zone, the no man’s land, however we want to term it, . . . And I know that you have correctly cited time and again that I am bound by the language that we used on October 15th when we made the decision and we put the settlement on the record. But, again, as I remember it very well and as I stated three months ago [at the February 27th hearing] this disputed fact is one that was left unresolved.” At the conclusion of the May 27 hearing, the court ruled that “anything that we resolved is not going to include that particular area.”

complaints. Thus, while the parties had not resolved the *fact* that the boundary was congruent with either the BaseLine survey or the Jensen survey, they did agree that this fact, whether in plaintiffs' favor or in defendants', would not be resolved through any more litigation between them. The trial judge recognized "this disputed fact"—the true location of the boundary—but improperly treated this open *factual* question as an open claim for future litigation between the parties.

“Although a judge hearing a section 664.6 motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment [citations], nothing in section 664.6 authorizes a judge to *create* the material terms of a settlement, as opposed to deciding what terms *the parties themselves* have previously agreed upon.” (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810 (*Weddington Productions*); *Critzer v. Enos* (2010) 187 Cal. App. 4th 1242, 1252; cf. *Hines, supra*, 167 Cal.App.4th at p. 1185 [judgment omitting material settlement terms did not accurately reflect parties' agreement, thus requiring reversal].) While acknowledging this rule, the trial judge nonetheless relied on his faulty recollection of the oral settlement and accepted plaintiffs' version of the settlement language. By doing so he added a material term to which “the parties themselves” had not agreed, thereby allowing an issue to re-emerge after it had been set to rest between these parties. (*Weddington Productions, supra*, at p. 810.) As the oral settlement clearly put an end to *all* claims, defendants should not have been subjected to the prospect of future litigation over the boundary between their property and that of plaintiffs.

#### *Disposition*

The judgment is reversed. On remand the trial court shall (1) modify paragraph 7 of the judgment to include the existing boundary dispute in the release of claims between the parties and (2) adjust the remaining provisions as necessary to ensure conformity to the oral settlement and to protect the rights of the parties. Defendants are entitled to their appellate costs.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.